

SOAH DOCKET NO. 582-06-1029
TCEQ DOCKET NO. 2005-2007-UCR

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APPLICATION OF CITY OF MIDLOTHIAN § BEFORE THE STATE OFFICE
TO AMEND CERTIFICATE OF §
CONVENIENCE AND NECESSITY (CCN) § OF
NO. 11706 AND TO CANCEL CCN NO. 11966, §
IN ELLIS COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

CHIEF CLERK'S OFFICE

**CITY OF MIDLOTHIAN'S REPLY TO WAX-MID, INC.'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSION:

NOW COMES, the City of Midlothian (City), Applicant for Amendment to CCN No. 11706, and timely files this Reply to Wax-Mid, Inc.'s (Wax-Mid) Exceptions to the Proposal for Decision pursuant to 30 T.A.C. § 80.257 and would show this Commission the following:

I.

WAX-MID'S 1986 ORDER NECESSITATES THE CCN AMENDMENT

Wax-Mid's Exceptions to the Proposal for Decision illustrates why it is necessary for the City of Midlothian to be granted its application to amend CCN No. 11706. Without the amendment to its CCN, the City of Midlothian is vulnerable to Wax-Mid's continual attacks against the water utilities the City of Midlothian has built to service the commercial and residential growth in its corporate limits and extra-territorial jurisdiction (ETJ).

Wax-Mid now maintains that it holds perpetual rights under a 1986 Order of the Texas Water Commission that the TCEQ cannot modify or repeal. Without this CCN Amendment the City is not going to be able to plan, finance and construct the water utility this rapidly growing area deserves.

With this 1986 Order, Wax-Mid claims to be in a more powerful position than if it had the CCN it first represented to this Commission and the City it had. At least this Commission

could penalize a Wax-Mid CCN for its failure in 21 years to receive a construction approval letter from the Texas Department of Health and for never providing water utility service by revoking Wax-Mid's CCN. *See* §13.254, Texas Water Code.

Instead, Wax-Mid now maintains that it should be able to hinder the City's growth perpetually because of the 1986 Order. Wax-Mid wants to cloud the City's planning, financing and construction of its water utility service area by depriving the City of the CCN Amendment it has earned.

ECOM owned Wax-Mid has let the City spend its resources to develop the water utility infrastructure that has enhanced the value of the ECOM owned land for the past twenty-one (21) years. Now, Wax-Mid wants to be able to hobble the City with the uncertainty resulting from not knowing whether the City will be able to be paid in the future for the water utility service it has planned and paid to construct.

ECOM has no standing to hold up this CCN Amendment and yet it is totally using Wax-Mid to further only ECOM's private economic interests with no consideration of the "service, accommodation, convenience, or safety of the public." ECOM through Wax-Mid wants to be able to take over water utility service in this area with its own CCN at some future date, and does not want the competition of the City having a CCN in the same area. Wax-Mid, having done nothing to deserve a CCN in 21 years, wants to deprive the City of the CCN Amendment it has earned.

This 1986 Wax-Mid Order creates a real danger to this City's ability to plan, finance and build water utility services for this area covered by this CCN amendment. The City needs this CCN amendment to protect its future water utility service from Wax-Mid's poaching. This CCN amendment is "necessary for the service, accommodation, convenience, or safety of the public"

under §13.246(b) of the Code.

II.

THE CITY HAS PROVEN THAT IT IS ENTITLED TO A CCN AMENDMENT

The ALJ's well reasoned and documented Proposal for Decision sets forth why the City's CCN amendment is necessary for the service, accommodation, convenience and public safety of the public. Wax-Mid's Exceptions to the Proposal for Decision ignore common sense and logic as well as the testimony offered regarding current and future development within this area.

Wax-Mid's Exceptions speciously manufacture a new, additional discriminatory criteria for the City to meet with the argument that the City has to additionally prove why it needs a CCN when the City can already lawfully serve the area in question as a municipality. This new criteria would only apply to and penalize municipalities; no other applicant for a CCN would have to meet that criteria. Wax-Mid and all other private utilities would somehow be able to qualify for CCN status more easily than municipalities. Municipalities can lawfully serve areas without CCN status for good public policy reason and should not be deprived of CCN status as growth occurs and more planning and investment in utility service is needed as in this case. Most municipalities do hold CCNs and amend their CCNs as growth occurs.

For example, Wax-Mid's claims the "fire protection" policy of the City is no evidence of need for a CCN amendment for "service, accommodation, convenience, or safety of the public." Wax-Mid argues "the City needs no piece of paper from the TCEQ to carry out its self imposed fire protection obligation, but whatever the merits of the City's fire protection policy, it is no evidence of need for a CCN amendment."

Wax-Mid ignores the large effort involved in laying the large pipe required by fire flow demand as was graphically detailed in Ken Pritchett's deposition testimony (p. 59 line 3 to p.60 line 18). Planning for, financing and constructing such a system necessitates the certainty a

CNN affords.

Dr. Victoria Harkins testified, "The effect of the CCN amendment on the City of Midlothian will be to allow the City of Midlothian to better plan and provide service to the eastern portion of their corporate limits and beyond. The City of Midlothian is already obligated to provide municipal services to the requested area. The land owners in the area will benefit from having service available from a competent and reliable provider." (City's Ex. No. 1, p.9, lines 14-18).

Additionally Dr. Victoria Harkins testified that, "The applicant currently provides service that meets and exceeds the requirements of the State of Texas for the purpose of providing potable water service...the City of Midlothian public water system is rated superior with the State of Texas. The city of Midlothian employs certified water operators and has a full time staff of engineers and administrative professionals." (City's Ex. No. 1, p.10, lines 3-8.)

Wax-Mid repeatedly argues this additional criteria that would only apply to municipalities who have already gone to great time and expense to serve the public with utility service before applying for a CCN amendment to cover the area of their City's impending growth. Nowhere does Section 13.246 of the Water Code indicate that municipalities have to meet this additional criteria. Indeed Section 13.246(c) states, "Certificates of Convenience and necessity shall be granted on a non-discriminatory basis...". To argue that this City has to meet an additional criteria because it is a municipality discriminates against this City. It is a ridiculous argument from a corporate entity, Wax-Mid, that has done nothing to justify its existence since 1986.

III.

THE CITY HAS MET ITS BURDEN OF PROOF

The City has met its burden of proof. See attached Exhibit "A", City of Midlothian's

Closing Statement and Exhibit "B", City of Midlothian's Rebuttal to Wax-Mid's Closing Statement, which are incorporated herein for all purposes.

Wax-Mid, Inc. argues that the City failed to prove that it met all the requirements for issuance of a CCN, under Section 13.246, by a preponderance of evidence. Wax-Mid, Inc. cites rule 80.127(a)(4) and (h) and asserts that it is the applicant and not the agency staff who must meet the burden of proof. The City concedes that as the applicant it has the burden of proof. The City did not rely on staff evidence or testimony to meet its burden of proof. The staff agency did support granting the City's CCN application. "I recommend that the City of Midlothian's request to amend its water CCN be approved for portions of the requested area that it is currently serving and that are within the City of Midlothian's corporate limits."¹ The fact that the Executive Director's pre-filed testimony supports granting the City's CCN application does not mean that the City relied on staff evidence and testimony to meet its burden of proof. The fact that the Executive Director's pre-filed testimony supports granting the City's CCN application does not mean that the ALJ relied on staff evidence and testimony to determine that the City met its burden of proof.

It is clear from the ALJ's PFD that the ALJ did not rely on Staff's Testimony to determine that the City met its burden of proof. Wax-Mid, Inc. argues that no cross-examination testimony of Dr. Harkins is competent evidence to meet the City's burden of proof. The City did not rely solely on Dr. Harkin's cross-examination testimony to meet its burden of proof. The PFD cites to Dr. Harkins' pre-filed testimony and not cross-examination of Dr. Harkins. While the executive director's testimony should not be used to help the applicant meet its burden of proof, the ALJ and commission is not prohibited from considering the executive director's

¹ Direct Testimony of Prabin Basnet, E.I.T., pg. 11, lines 258-260.

testimony. The position presented by the executive director in a contested case hearing is considered part of the record. Prohibiting the ALJ from considering the executive director's position would render the Executive Director's testimony or evidence meaningless.

The agency staff and the administrative law judge "ALJ" both found that the City met its burden of proof. The ALJ's recommendation is based on the preponderance of evidence. The City takes issue with Wax-Mid, Inc.'s assertion that matters outside the record or evidence from agency staff are the basis for the ALJ's findings.

IV.

THE ADMINISTRATIVE RECORD IS NOT DEFECTIVE

Wax-Mid, Inc. argues that the record is defective in this case because there was no court reporter. Section 80.19 of the TCEQ rules concerning contested case hearings requires only an audio recording. The ALJ recorded this proceeding.

There was no court reporter present at the hearing as this matter lasted less than one day. Section 155.43 (b) of the SOAH rules provides in pertinent part that, "Unless otherwise ordered by the judge, the referring agency shall provide a court reporter for any proceeding in a docket set to last longer than one day...." Initially the proceeding was docketed for two days. However, Wax-Mid, withdrew its Request for a Cease and Desist order and the parties and ALJ determined that hearing would only last one day. 30 TAC § 80.23 provides that the commission will provide a certified court reporter to make a verbatim record and transcript of any commission meeting, hearing or other proceeding upon timely request of any person. Wax-Mid did not timely request a court reporter to make a verbatim record and transcript. Furthermore, the rules provide that a request for a verbatim record or transcript of a proceeding shall be submitted in writing.

The City had the portion of Don Hastings Rebuttal transcribed and included it in its Closing Arguments and Wax-Mid filed a motion to exclude such testimony, however, the ALJ denied said motion. The City argues that excluding its rebuttal testimony would be prejudicial.

**V.
MOTION FOR SUMMARY DISPOSITION RULING**

Wax-Mid, Inc. argues that the ALJ should have denied the City's CCN application since she denied the City's Motion for Summary for Disposition. TCEQ rule 80.137(c), relating to summary disposition allows granting such motion when the evidence submitted with motion shows "there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. By denying the motion, the ALJ must have determined there was an issue of fact, and proceeded with the contested case hearing. During the hearing, the City as the applicant was able to put on rebuttal testimony. In addition, the City offered portions of Ken Pritchett's deposition testimony. The ALJ's decision is based on the portion of Ken Pritchett's deposition testimony that was offered into the record, City's pre-filed testimony and rebuttal testimony. Wax-Mid, Inc.'s argument that no additional competent evidence was admitted at the hearing that would support the ALJ's finding that the City met its burden of proof is simply not true.

**VI.
CONCLUSION**

The City agrees with the ALJ that the Commission has the authority, and nothing in the 1986 Order prevents the Commission from issuing the City a CCN for the same area as the 1986 order. The CCN requested is necessary for the service, accommodation, convenience, or safety of the public. Therefore, the City requests that the Commission approved the City's CCN application as recommended by the ALJ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **City of Midlothian's Reply To Wax-Mid, Inc.'s Exceptions to the Proposal For Decision** was served upon the following parties by facsimile and/or first class mail or overnight delivery on this 26th day of April 2007:

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CERTIFICATE OF CONVENIENCE	§	ADMINISTRATIVE HEARINGS
AND NECESSITY NO. 11966 IN	§	
ELLIS COUNTY, TEXAS	§	

CITY OF MIDLOTHIAN'S CLOSING ARGUMENTS

The City of Midlothian ("City of Midlothian") files these Closing Arguments in support of its application, to amend its Certificate of Convenience and Necessity ("CCN") to provide water utility service in Ellis County, Texas and to cancel CCN No. 11966.

I. PROCEDURAL AND FACTUAL BACKGROUND

Recognizing the need for reliable water service to be available in a developing portion of Ellis County, along Highway 287, which another private company, Wax-Mid, Inc., allegedly holding a CCN since 1986, had failed to provide water utility service to, the City of Midlothian submitted an application to amend its CCN No. 11706 and to Cancel Certificate of Convenience and Necessity No. 11966 with the Texas Commission on Environmental Quality ("TCEQ") on August 30, 2005.

Wax-Mid, Inc. responded by requesting a Cease and Desist Order against the City of Midlothian. On April 4, 2006, a preliminary hearing was held at the State Office of Administrative Hearings. The only non-statutory party was Wax-Mid, Inc., the entity that claimed to hold CCN No. 11966. After extensive and expensive discovery including oral depositions of numerous witnesses, Wax-Mid, Inc., on November 14, 2006, withdrew its

EXHIBIT **A**

Request for a Cease and Desist Order against the City of Midlothian conceding that Wax-Mid, Inc. never was granted a CCN. (See Wax-Mid, Inc.'s Cross-Motion for Summary Disposition, pages 2-3.)

Wax-Mid, Inc. retreated claiming instead novel perpetual rights under a 1986 Order to seek a Certificate of Convenience and Necessity in the future while admitting that Wax-Mid, Inc. had failed to secure the permits required by the Order in the last 20 years. Additionally, Wax-Mid, Inc. admitted that the 1986 Order does not expressly authorize it to exclude other utilities from providing water utility service by the area covered in the 1986 Order. (Id.) The hearing of the merits commenced November 28, 2006.

II. STATUTORY CRITERIA TO AMEND CCN

The City of Midlothian seeks to add certain territory adjacent to the territory within its existing CCN No. 11706, regardless of the Commission's actions regarding CCN No. 11966. The Commission is to consider the following statutory criteria when determining whether a CCN or CCN amendment should be granted to an applicant. Texas Water Code § 13.246(c) and 30 TAC § 291.102(d):

- (1) the adequacy of service currently provided to the requested area;
- (2) the need for additional service in the requested area;
- (3) the effect of the granting of a certificate on the recipient of the certificate and on any retail public of the same kind already serving the proximate area;
- (4) the ability of the applicant to provide adequate service;
- (5) the feasibility of obtaining service from an adjacent retail public utility;
- (6) the financial stability of the applicant, including if applicable, the adequacy of the applicant's debt-equity ratio;
- (7) environmental integrity; and

(8) the probable improvement in service or lowering of cost to consumers in that area. Section 13.241(a) of the Texas Water Code requires that the commission ensure that the CCN applicant possesses the financial, managerial and technical capability to provide continuous and adequate service.

A. Adequacy of Current Service

The record reflects that the City of Midlothian provides adequate water and sewer service within its corporate limits. Dr. Victoria Harkins, P.E., PhD. testified that, “[t]he City of Midlothian is providing retail water service to three commercial connections within the proposed area.” (City’s Ex. No. 1, p. 9, lines 3-4.) Mr. Prabin Basnett testified that, “[t]here are three connections (Ennis Business Forms, Mid Way Airport, Whataburger) currently receiving service from the City of Midlothian.” (ED Ex. 4, p. 7, lines 168-169.) Mr. Ken Pritchett, developer of the Walnut Grove Development Park, which contains Ennis Business Forms and Whataburger, testified that City water customers are satisfied with the water service they are receiving. (Mr. Ken Pritchett’s deposition p. 51 l. 19 to p 52.)

B. Need for Additional Service

The preponderance of evidence demonstrates that there is a need for additional service in the proposed service area. Dr. Victoria Harkins testified that the majority of the requested area is within the corporate limits of the City of Midlothian. “The City of Midlothian has trunk lines that run along and within the requested area to reach service needs that extend to the east of the City.” (City’s Ex. No. 1, p. 9, lines 9-10.) Additionally, Mr. Don Hastings provided testimony that supports the fact that this area is ripe for development. Mr. Don Hastings stated that, “The CCN area is bounded on the south by a four-lane divided highway, bounded on the west by a

future six-lane highway, and there is a four-lane divided highway to cross this property, all because this property is adjacent to two major activity centers that are emerging, the airport, and the office, retail, and medical activity centers.”

ECOM Real Estate Management, Inc. (“ECOM”) allegedly an owner of some of the land within the requested area, has submitted a development proposal for a very intense mixed-use development on this ECOM property according to Mr. Don Hastings’ rebuttal testimony at the conclusion of the evidentiary hearing. Additionally, ECOM sold “200 to 300 acres” bordering Highway 287 in 2001 to Mr. Ken Pritchett for commercial development. (Ken Pritchett’s deposition p. 7, lines 23-p.8, line 8.)

Mr. Ken Pritchett testified by deposition that since 1992, he has developed six real estate projects in the Midlothian area including very high-end residential homes and several commercial developments. (p. 6, line 1 - p. 7, line 11.) His largest commercial project is on the land he bought from ECOM at the corner of Walnut Grove and Highway 287. On the 60 acres located on the north side of Highway 287, which is within this City CCN expansion request, Mr. Ken Pritchett testified he constructed a very nice business park on which Ennis Business Forms built its corporate headquarters. (p. 8, line 4 - p. 9, line 7.) Additionally, a Whataburger was built in this Walnut Grove business park. Mr. Ken Pritchett’s intent is to sell this land to other similar commercial businesses in the near future, as reflected by his deposition testimony at page 47, lines 20-24, as follows:

“Q: Do you have any expectation as to when the rest of your lots on the north side of the Walnut Grove property will be developed?

A: I sure hope before long because I’m getting pretty old. My wife has already threatened me.”

In view of the foregoing evidence, Mr. William Nabors' testimony that "development is not foreseeable" is clearly not credible. Development is absolutely foreseeable, particularly knowing that ECOM has already sold 200-300 acres of this property for commercial development five years ago and is in the business to invest in real estate and develop it. The property is strategically located within commuting distance to Dallas-Ft. Worth and between the two growing suburban cities of Midlothian and Waxahatchie.

As Mr. Don Hastings, Midlothian's Deputy City Manager, testified at the hearing, "So whether that property owner is suggesting to the City that they have no plans to develop or in fact, that they have plans to develop at a very high density, the City can not prepare and proceed and adopt plans based upon those claims or assumptions; because it is the land that the City should be planning for, namely, the location of the land." This land in particular is ripe for development and planning for said development is the City's obligation and duty.

Finally, Mr. Ken Pritchett, a former Mid-Way Airport Board member, testified by deposition that the expansion of the Mid-Way Airport depends upon the water and sewer services provided by the City to this area. (p. 27, line 5 - p. 28, line 19.) Mr. Ken Pritchett describes in said excerpt how the airport in the past lost the opportunity to have several very large hangers for commercial business built and jobs because the City was not providing the water service to this airport in the past.

C. Effect on Applicant and other Utilities

The record reflects that if the City is granted the amendment to its CCN, it will be able to continue serving the Mid-Way Regional Airport, Ennis Business Forms and Whataburger, and the City would be able to provide reliable service within the area. In addition, the record demonstrates that no other utility would be affected. Wax-Mid, Inc. does not hold a CCN for the

area and has not satisfied the conditions to obtain a CCN for the area since 1986. Sardis Lone Elm WSC, the neighboring utility, and the City have reached an agreement designating water service areas and the requested area is within the area to be served by the City of Midlothian.

(City's Ex. No. 3, DH-3 and DH-4.)

Dr. Victoria Harkins testified:

The effect of the CCN amendment on the City of Midlothian will be to allow the City to better plan and provide service to the eastern portion of their corporate limits and beyond. The only other retail public utility in the proximate area is Sardis Lone Elm Water Supply Corporation (WSC). The City and Midlothian and Sardis Lone Elm WSC have an agreement that in one part delineates the service area of each." (City's Ex. No. 1, p. 9, lines 14-21.)

Mr. Prabin Basnet testified:

Based on the July 1, 1986 order issued by Texas Water Commission in relation to the Wax-Mid, Inc. CCN application, Wax-Mid, Inc. has not satisfied the conditional requirements for issuance of CCN No. 11966. Therefore, there will be no effect on Wax-Mid, Inc. (ED Ex. No. 4, p.8, lines 190-193.)

D. Applicant's Ability to Serve

The record reflects that the City of Midlothian has the ability to provide service to the area it has requested. Mr. Prabin Basnet testified:

The City of Midlothian currently operates a superior public water system under ID No. 00700005. The City of Midlothian has a surface water treatment capacity of 12.196 Million Gallons per day ("MGD"), the City of Midlothian is required to provide 7.01 MGD to its retail and wholesale customers." (ED Ex. No. 4, p. 9, lines 201-204.)

Dr. Victoria Harkins, testified:

The applicant currently provides service that meets and exceeds the requirements of the State of Texas for the purpose of providing potable water service...the City of Midlothian public water system is rated as superior with the State of Texas. The City of Midlothian employs certified water operators and has a full time staff of engineers and administrative professionals." (City's Ex. No. 1, p.10, lines 3-8.)

E. Feasibility of Service from Adjacent Utilities

Both Dr. Victoria Harkins and Mr. Prabin Basnet agree that it is not feasible to obtain water service from an adjacent retail public utility. Mr. Prabin Basnet concludes that it is not feasible to obtain service from adjacent utilities. "Wax-Mid, Inc. does not have any facilities to provide water service. Based on the discovery responses and prefiled testimony of Dr. Victoria R. Harkins, P.E., expert witness of the City of Midlothian, Sardis Lone Elm Water Supply Corporation received treated water from the City of Midlothian on an emergency basis." (ED Ex. No. 4, p.12, lines 211-214.)

Dr. Victoria Harkins testified:

The City of Midlothian currently has contracts for purchase of approximately 15 million gallons per day of surface water. Sardis Lone Elm WSC has contacted the City of Midlothian to potentially purchase water from the City of Midlothian for additional water for their current customers. There is no need to obtain service from an adjacent retail public utility. Wax Mid, Inc. is not a retail public utility. (City's Ex. No. 1, p. 10, lines 10-15.)

F. Financial Stability

The City has demonstrated that it has the financial stability to provide continuous and adequate service to the area it has requested. The City of Midlothian offered into evidence a copy of its latest financial statement that demonstrates that it has the financial stability necessary to provide service to the requested area. In addition, Mr. Michael Adams, Director Engineering for the City of Midlothian, testified that the City of Midlothian has the authority to sell revenue bonds to finance any needed improvements. (City's Ex. No. 2, p.4, lines 39-41.) Dr. Victoria Harkins testified that, "[t]he City of Midlothian is a home rule municipality with the powers of taxation and the ability to issue bonds for infrastructure and needed capital assets." (City's Ex. No. 1, p. 10, lines 19-20.)

G. Environmental Integrity

If the application is approved, the City will use its current supply of surface water to provide service to the proposed area. Dr. Victoria Harkins testified that, "...the City of Midlothian utilizes surface water which is commonly preferred to over the use of groundwater." (City's Ex. No. 1, p.11, lines 1-3.) Mr. Prabin Basnet testified that, "The environmental integrity will be temporarily disturbed if facilities are to be constructed. The City of Midlothian already provides water service to three connections in the proposed area and it appears that no additional facilities will be constructed at this time." (ED Ex. No. 4, p.13, lines 229-231.)

H. Improvement in Service and Lowering of Costs

Dr. Victoria Harkins testified that, "There will be an improvement of service since service will now be available from a capable and proven water supply provider. The cost to customers will be the same as current customers of the City of Midlothian since the requested area is within the corporate limits of the City of Midlothian." (City's Ex. No. 1, p. 11, lines 6-9.) The "FM Checklist" prepared by Mr. Dan Smith, provides that, "This city likely can provide service the most efficiently and at the least cost to the proposed new customers in the requested area." (ED Ex. No. 1, p. 2.)

III. FINANCIAL, MANAGERIAL, AND TECHNICAL CAPABILITY

Based on foregoing testimony, the City of Midlothian has demonstrated that it has the financial, managerial, and technical capability to provide continuous and adequate service to the proposed service area. Mr. Dan Smith determined in the "FM Checklist" that the City had demonstrated adequate financial and managerial capability to provide service to the requested area. ED Ex. No. 1, p.1.

IV. WAX-MID, INC.'S SERVICE RIGHTS, IF ANY, SHOULD BE REVOKED

A. Previous attempts to transfer Wax-Mid, Inc. stock are void.

The City of Midlothian asserts that any rights that Wax-Mid, Inc. claims that it has under the 1986 Order issued by the Texas Water Commission are void. Mr. William Nabors testified on November 28, 2006, under cross-examination, that he did not have any proof that Wax-Mid, Inc. reported to the Texas Water Commission the transfer of ownership that occurred on August 29, 1986. Mr. William Nabors also testified under cross-examination that he did not have any proof that the transfer of stock of Wax-Mid, Inc. from Blackland properties to ECOM was reported to the Commission. Since Wax-Mid, Inc.'s stock transfer to Blackland Properties was never reported to the Texas Water Commission it is void.

Section 13.302(f) of the Water Code provides in pertinent part that:

A purchase or acquisition that is not completed in accordance with the provisions of this section is void.

Blackland Properties, Ltd. was dissolved in 1992 and its assets, including Wax-Mid, Inc., were conveyed to ECOM. The Secretary of State revoked Wax-Mid, Inc.'s Certificate of Authority for failure to pay franchise taxes on June 9, 1992. It was only after ECOM became aware that the City of Midlothian had invested in development of the water services necessary to supply the Mid-Way Airport and adjacent businesses that ECOM paid the thirteen plus (13+) years of delinquent franchise taxes. On October 26, 2005, the Secretary of State reinstated said Certificate of Authority to Wax-Mid, Inc. based upon a representation by Mr. Nabors that ECOM owned the Wax-Mid, Inc. stock. However, since the two attempts to transfer the Wax-Mid, Inc. stock were void, the representations by Mr. Nabors in the application for reinstatement were not true.

B. Revocation.

At any time after notice and hearing, the Commission may revoke any certificate of convenience and necessity if it finds certain facts exist. (Texas Water Code Ann. § 13.254(a).¹)

The facts for revocation, include among others, that the certificate holder has: never provided, is no longer providing, is incapable of providing or has failed to provide continuous and adequate service; agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate; and failed to file a cease and desist action within 180 days after becoming aware of another retail public utility is providing service within its service area. (Texas Water Code Ann. § 13.254(a)(1, 3, and 4).)

There is no dispute that Wax-Mid, Inc. has never provided retail water service. Mr. William Nabors admitted on cross-examination by Mr. Gabriel Soto on November 28, 2006 that Wax-Mid, Inc. does not have or maintain any water utility infrastructure to include meters, lines, systems, et cetera, in place to provide water service to commercial or residential customers today.

There is also no dispute that the City of Midlothian is a retail public utility and that the City of Midlothian has been serving within the territory designated on TCEQ maps as being within the CCN held by Wax-Mid, Inc. for more than six months prior to Wax-Mid, Inc. filing its request for a CCN. There is also evidence that Wax-Mid, Inc. has contracted with Sardis-Lone Elm Water Supply Corporation to provide service within the territory designated on TCEQ maps as being in Wax-Mid, Inc.'s CCN.

¹ Texas Water Code Ann. § 13.254(a) was amended by H.B. 2876 by inserting the phrase "on its own motion or on receipt of a petition described by subsection (a-1)" between the words "may" and "revoke" in the first sentence. The application was filed before the amendments became effective, but the amendment does not have any effect on the pending application.

As a result of this proceeding, the parties discovered that Wax-Mid, Inc. was never issued a CCN because Wax-Mid, Inc. never satisfied the conditions set forth in the order approving Wax-Mid, Inc.'s application in 1984. Since Wax-Mid, Inc. does not hold a CCN, then the area that the City of Midlothian wants to add to its CCN is not within the CCN of another utility.

However, the Commission should proceed to revoke its authorization for Wax-Mid, Inc. to acquire a CCN based upon the application by the City of Midlothian and the evidence admitted in this proceeding. When the City of Midlothian filed this application and Wax-Mid, Inc. appeared and was named a party, everyone was under the impression that Wax-Mid, Inc. held a CCN. Wax-Mid, Inc. appeared to defend its CCN, and fully participated as a party claiming to hold a CCN until shortly before the hearing on the merits, so Wax-Mid, Inc. cannot complain about any notice issues.

While Wax-Mid, Inc. technically does not hold a CCN, and section 13.254 uses the phrase "certificate of convenience of necessity," the Commission has jurisdiction to grant the relief requested by the City of Midlothian based upon the evidence submitted in this proceeding. Wax-Mid, Inc. is the beneficiary of an order issued in 1986 approving its application for a CCN, but subject to certain conditions that were never satisfied. The Commission could address this issue at least two ways: (i) find that the 1986 order was never final, being subject to conditions, and issue an order denying the application; or (ii) adopt an order that repeals or modifies the 1986 order in a manner that prohibits Wax-Mid, Inc. from waiting 20 years to satisfy the conditions for obtaining a CCN, using the Commission's general authority to adopt orders under Texas Water Code Ann. §§ 5.102 and 13.041 (c).

The Commission can still rely upon section 13.254 for revocation or amendment of the 1986 order. The Legislature's intent in adopting chapter 13 is plainly expressed in Texas Water

Code Ann. § 13.001(c) as establishing "a comprehensive regulatory system that is adequate to the task of regulating retail public utilities." Section 13.254 should not be construed narrowly because the term "certificate of convenience and necessity" is not defined by the Legislature in section 13.002, nor is the phrase defined by the Legislature in subchapter G. Absent such a definition, the 1986 order should be construed as a "certificate of convenience and necessity."

V. CONCLUSION

Based on the preponderance of evidence, the City of Midlothian maintains that it meets all the statutory criteria to amend its CCN to include the proposed area. In addition, the CCN amendment requested is necessary for the service, accommodation, convenience, or safety of the public.

Respectfully submitted,

DAVIDSON & TROILO, P.C.

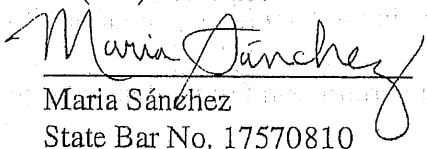
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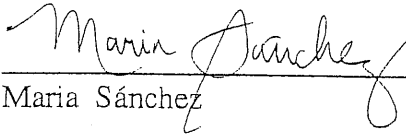
By:


Maria Sánchez

State Bar No. 17570810

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the City of Midlothian's Closing Arguments were served on all parties of record via facsimile transmission or U.S. mail on this, the 12th day of January, 2007.



Maria Sánchez

SOAH DOCKET NO. 582-06-1029
TCEQ DOCKET NO. 2005-2007-UCR

APPLICATION OF CITY OF MIDLOTHIAN
TO AMEND CERTIFICATE OF
CONVENIENCE AND NECESSITY (CCN)
NO. 11706 AND TO CANCEL CCN NO. 11966,
IN ELLIS COUNTY, TEXAS

§ BEFORE THE STATE OFFICE
§
§ OF
§
§ ADMINISTRATIVE HEARINGS

**CITY OF MIDLOTHIAN'S REBUTTAL TO WAX-MID, INC.'S
CLOSING STATEMENT**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES, the City of Midlothian, the applicant, and files this Rebuttal to Wax-Mid, Inc.'s Closing Statement.

I.

THE APPLICATION TO AMEND THE CITY'S CCN SHOULD BE GRANTED

The City has met its burden of proof on all statutory criteria under §13.246 as shown in the City's Closing Arguments and evidence it produced throughout this Commission proceeding.

II.

THE APPLICATION TO REVOKE WAX-MID'S CCN SHOULD BE GRANTED

It is incredulous for Wax-Mid to argue that the TCEQ may revoke a CCN, but cannot revoke an order authorizing the issuance of a CCN when Wax-Mid has failed to fulfill the requirements of the order for twenty years, even letting its charter lapse for thirteen years. It is not just and reasonable for a CCN applicant to fail to satisfy the conditions of a TCEQ order for more than twenty years and then argue that the TCEQ is powerless to revoke the order approving the application. The existence of the order that has been unfulfilled for twenty years casts a cloud over the development by the City of Midlothian of water service infrastructure and service to a rapidly developing area within its corporate limits and the extra-territorial jurisdiction. The

EXHIBIT **B**

TCEQ has the power as well as the duty to revoke said order for the public interest.

A. TCEQ HAS JURISDICTION OVER WAX-MID.

Wax-Mid admits in its Closing Statement, p. 2, that it is "a business corporation incorporated in 1984 for the purpose of operating a water utility in Ellis County" and as such it is subject to TCEQ jurisdiction.

The Legislature has declared that:

"The purpose of Chapter 13 is to establish a comprehensive regulatory system that is adequate to the task of regulating retail public utilities to assure rates, operations, and services that are just and reasonable to the consumer and to the retail public utilities."

Texas Water Code Ann. §13.001.

Additionally, § 13.411(a) gives the TCEQ jurisdiction over any "person or corporation" failing to comply with this Chapter Thirteen or with any rule or order. Wax-Mid has failed, for twenty years, to comply with the requirements of the 1986 Order.

The TCEQ can impose personal penalties, administrative penalties cumulative penalties as well as contempt proceedings under § 13.415, § 13.4151, § 13.416, and § 13.417, Texas Water Code. Any person, who willfully and knowingly violates this chapter, is guilty of a third degree felony. Wax-Mid's position that it is not a utility does not permit them to escape the TCEQ's jurisdiction.

Under § 13.002(i) Texas Water Code, the definition of an "affected person" means, "any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility *or that desires to enter into competition.*" (emphasis added) Clearly, Wax-Mid fits this definition. The whole purpose of its opposition to the City of Midlothian expanding its CCN is premised upon a "desire to enter into competition" to provide water service in the same area the City is seeking to expand its CCN to cover.

B. TCEQ HAS THE LEGISLATIVE POWER TO REVOKE WAX-MID'S 1986 ORDER.

The intent of the Legislature to give the TCEQ the power to revoke this 1986 Order is clear in Water Code, §5.102. This law provides:

(a) The commission has the powers to perform any acts whether specifically authorized by this code or other law or implied by this code or other law, necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws.

(b) The commission may call and hold hearings, receive evidence at hearings, administer oaths, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, *and make findings of fact and decisions with respect to its jurisdiction under this code and other laws and rules, orders, permits, licenses, certificates, and other actions adopted, issued, or taken by the commission.*

Tex. Water Code Ann. §5.102. (emphasis added)

II.

C. THE 1986 ORDER SHOULD BE REVOKED AS BASED ON FALSE REPRESENTATIONS.

Wax-Mid's final statement, p. 4, also admits that in the 20 years since the 1986 Order was entered "Wax-Mid has failed to submit construction plans for a water system since the land subject to the 1986 Order, with limited exceptions, remained undeveloped and without a development time table."

Wax-Mid thus admits that its application for a CCN in 1984 was based on false representations. The 1986 Order was granted based upon the following false representations:

"17. Wax-Mid's requested service area is the Diamond J Ranch, which consists of approximately 1,700 acres. Development of this area will occur in increments of 80 acres per year, spread over 10 to 20 years. Residential service could be required as early as mid-summer 1986.

18. Black Land Properties will develop the Diamond J Ranch as a planned residential development.

19. The proposed development needs to have a large water source available that could be upgraded as necessary to meet the developer's needs. If Wax-Mid's CCN application is denied, development plans would be halted for the present time."

D. WAX-MID INVOKED THE TCEQ'S JURISDICTION LONG AFTER IT BECAME AWARE OF THE 1986 ORDER.

On October 27, 2005, Wax-Mid submitted itself to the jurisdiction of the TCEQ when Wax-Mid filed its Protest Notice of Appearance, and Request for Hearing in response to the City's Application. On December 22, 2005, Wax-Mid again sought the protection of the TCEQ's jurisdiction when it filed a Request for a Cease and Desist Order based on the City's water utility service to the Walnut Grove Tract. Wax-Mid additionally, on August 10, 2006, supplemented its request for a Cease and Desist Order upon allegedly learning that the City was also providing water utility service to the Airport Tract.

Wax-Mid seems to now claim that it was unaware that it had failed to comply with the 1986 Order while invoking TCEQ jurisdiction asserting it had a CCN up until November 14, 1986. In fact, Wax-Mid provided a very legible copy of the 1986 Order as Exhibit 7 to William Nabors' Prefiled Testimony on August 26, 2006. See Exhibit "A."

E. WAX-MID DOES NOT HAVE A VESTED RIGHT TO A CCN.

The TCEQ has the authority to revoke the 1986 Order. §§13.242 and 13.254 of the Texas Water Code gives the TCEQ the power to give and take away CCN's and to regulate even non-utilities providing retail water services in non-certificated areas. If a CCN holder does not have a vested right to provide water services, the holder of a 20-year Order, preliminary to a CCN that has been ignored, and acted contrary to, certainly has no vested right. As stated previously, it is intellectually dishonest for Wax-Mid to argue that the TCEQ has jurisdiction to revoke a CCN, but does not have jurisdiction to revoke a "preliminary" order authorizing the

issuance of the CCN.

F. JUDICIAL ESTOPPED AND EQUITABLE ESTOPPEL.

Wax-Mid is judicially and equitably estopped from claiming to have rights under the 1986 Order because up until November 14, 2006, Wax-Mid in multiple judicial pleadings maintained it had a CCN, forcing the City of Midlothian to engage in discovery, written and oral, defending against Wax-Mid's Request for a Cease and Desist order. Said Cease and Desist action was predicated on Wax-Mid maintaining in their pleadings that they had a CCN. Only when grounds for revocation for Wax-Mid's alleged CCN were undisputedly established during discovery, did Wax-Mid backtrack and 14 days before the hearing on the merits, came up with this new argument that the 1986 order is cast in stone.

G. SEXTON V. MOUNT OLIVET CEMETERY DISTINGUISHABLE.

Wax-Mid is claiming the 1986 Order cannot be rescinded or revoked by the TCEQ and as authority cite *Sexton v. Mount Olivet Cemetery Association*, 720 SW 2d 129 (Tex. App. - Austin 1986, writ ref'd). Sexton is distinguishable because it is not a proceeding before the TCEQ. The Legislature in §13.001 has vested the TCEQ with the inherent power in order to establish a comprehensive regulatory system to protect the public interest inherent in the rates and services of retail public utilities.

Actually, Sexton at pages 138-9 supports the TCEQ having the authority to revoke the 1986 Order:

"Frequently, the statute may reflect that the Legislature has *expressly* delegated such a power to the agency, doing so in terms that are more or less specific as to the scope of the power and the occasions when it may be exercised. For example...The Public Utility Commission may "revoke or amend any certificate of convenience and necessity," that it has previously issued, if the agency finds that the holder of the certificate never supplied the authorized utility service or has ceased doing so, as expressly stated in Tex.Rev.Civ.Stat.Ann.art. 1446c, §62

(Supp. 1986) ...The Texas Water Commission may amend permits previously issued by it, authorizing certain discharges of waste, because it is expressly empowered to do so under Tex. Water Code Ann.art. 26.027 (Pamph.Supp.1986).

Even in the absence of an express and specific delegation of the power to reopen an administrative proceeding, it is rather simple in many cases to conclude that the Legislature intended that the agency have that power as a necessary adjunct to other powers it has delegated to the agency, or as a *necessary* adjunct of the duties and functions expressly assigned the agency, it being manifest that the Legislature *must* have intended a workable and effective exercise of the powers expressly and specifically granted the agency, directed in most cases toward protecting the public interest and not the private interests of the regulated persons, organizations, or activities. In such cases, the power to reopen may be *implied*."

(emphasis added)

Additionally, the 1986 Order in question was not a "Final Order." On its face it states:

"Wax-Mid, Inc. is ISSUED an Order preliminary to the issuance of a certificate of convenience and necessity."

If by statute §13.254 the Legislature has decreed that the TCEQ can revoke or amend a CCN, there can be doubt that the TCEQ is authorized by said Legislature instead to revoke an Order preliminary to the issuance of a CCN.

H. WAX-MID HAD ADEQUATE NOTICE.

Wax-Mid should not be permitted to claim lack of notice regarding the 1986 Order when they waited until November 14, 2006 to raise this 20-year-old Order for the first time. Wax-Mid appeared to oppose the City's application, which revoked Wax-Mid the authority to provide water service and cannot argue lack of notice. All arguments pertinent to the 1986 Order should be stricken because they were used to ambush the City of Midlothian on the eve of the November 28, 2006 hearing on the merits.

Clearly no showing of harm or prejudice has been shown by Wax-Mid as they sat on this 1986 Order argument for months, if not years, maintaining instead they had a CCN, which the City continuously denied. *McDaniels v. Texas Natural Resource Conservation Commission*, 982

SW 2d, 650, 654 (Tex. Civ. App. - Austin, 1998).

I. WAIVER.

Wax-Mid has waived its rights under the 1986 Order by its course of conduct over the past twenty years. Wax-Mid has engaged in conduct that is inconsistent with a known right. *Ford v. Culbertson*, 308 SW 2d 855, 865 (1958).

Specifically, Wax-Mid for the past twenty years has failed to obtain a construction approval letter from the Texas Department of Health, which was a condition precedent to Wax-Mid being entitled to secure a CCN. The 1986 Order, which Wax-Mid relies upon in their Closing Statement, was obtained based upon representations that its requested 1700-acre service area on the Diamond J Ranch would develop "in increments of 80 acres per year, spread over 10 to 20 years. Residential service could be required as early as mid-summer 1986."

Wax-Mid was purchased by Blackland Properties, the owner of the Diamond J Ranch, immediately after this 1986 Order was granted in July 1986. Wax-Mid was subsequently transferred to ECOM from Blackland Properties along with the former Diamond J. Ranch acreage in Ellis County in 1992.

Neither Blackland Properties, nor ECOM, ever fulfilled the representations to warrant the issuance of this 1986 Order, even though as the real estate developers of the Diamond J Ranch both corporations had the ability to do so.

WHEREFORE, PREMISES CONSIDERED, the City of Midlothian moves this Commission to revoke the 1986 Order and grant the City of Midlothian's amendment to its CCN to provide water utility service to this area in Ellis County, Texas and for such other and further relief to which the City of Midlothian may show itself entitled.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing CITY OF MIDLOTHIAN'S REBUTTAL TO WAX-MID, INC.'S CLOSING STATEMENT was served upon the following parties by facsimile and/or first class mail or over night delivery on this 25th day of January 2007:

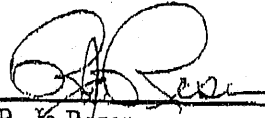
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R. Jo Reser

EXHIBIT "A"

WAX-MID'S EXHIBIT NO. 7

TEXAS WATER COMMISSION



AN ORDER on the Application of Wax-Mid, Inc.
for a Certificate of Convenience and
Necessity to Provide Water Utility
Service within Ellis County--
Docket No. 5951

On July 1, 1986, the Texas Water Commission considered the application of Wax-Mid, Inc. for a certificate of convenience and necessity to provide water utility service within Ellis County, Texas. The application was presented to the Commission with an Examiner's Report (Proposal for Decision) by Deborah Miller, Attorney, a Public Utility Commission Administrative Law Judge, who conducted an adjudicative public hearing concerning the application on January 21, 1986.

The Administrative Law Judge designated the following parties to the proceeding: Wax-Mid, Inc; the City of Waxahachie; Sardis-Lone Elm Water Supply Corporation; and the City of Midlothian. The City of Waxahachie later withdrew from the proceedings, and the City of Midlothian was later dismissed as a party from the proceeding without objection.

After considering the Examiner's Report and the evidence and arguments presented, the Texas Water Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On October 1, 1984, Wax-Mid, Inc. (Wax-Mid) filed an application for a certificate of convenience and necessity (CCN) to provide water utility service within Ellis County.
2. On October 15, 1984, Sardis-Lone Elm Water Supply Corporation (WSC) filed a letter protesting this application. This letter was treated as a motion to intervene.
3. WSC's motion to intervene was granted at a prehearing conference held on November 12, 1984, and confirmed by written Order signed on November 19, 1984.
4. On December 21, 1984, Wax-Mid filed a motion to amend its certification application to reduce the requested service.

- area. This motion was granted by Order signed on January 7, 1985.
5. On January 15, 1985, Wax-Mid filed a second motion to amend its application by a further reduction, which was granted by Order signed on January 17, 1985.
 6. The hearing on the merits in this docket, originally scheduled to begin on February 5, 1985, was indefinitely continued at the request of the applicant, by Order signed on February 1, 1985.
 7. On June 26, 1985, Wax-Mid filed a third motion to amend its certification application, reducing the requested area still further, to that depicted on Wax-Mid Exhibit No. 6. This motion was granted by Order signed on July 2, 1985.
 8. The hearing on the merits was held on January 21, 1986.
 9. WSC was given the opportunity to file as a late-filed exhibit a copy of water map WM 37.5-75 found in its certificate file No. 10058, in order to attempt to substantiate its contention that it has a certificate to provide service to the entire area surrounded by its facilities. This exhibit, which was assigned Sardis-Lone Elm Exhibit No. 3, was never filed.
 10. Briefs were filed on March 13, 1986. No reply briefs were filed.
 11. Newspaper notice was published in The Waxahachie Daily Light on October 17 and 24, 1984.
 12. All neighboring water utilities within five miles of the requested service area (Rockett Water Supply Corporation, Sardis-Lone Elm Water Supply Corporation, Busana Vista Water Supply Corporation, and Mt. Peak Water Supply Corporation) received personal notice of the filing of this CCN application.
 13. All neighboring cities providing water utility service within five miles of the requested service area,

- (Waxahachie, Midlothian, and Red Oak) received personal notice of the filing of this certification application.
14. Wax-Mid Exhibit No. 6 shows the service area requested as of the commencement of the hearing, which includes land south of U.S. 287.
 15. At the conclusion of the hearing on the merits, counsel for Wax-Mid orally reduced Wax-Mid's requested service area to that shown on the Shive-Hattery Engineers map, entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Wax-Mid witness Kammerer admitted as Wax-Mid Exhibit No. 2. Counsel for Wax-Mid further agreed that Wax-Mid was not seeking to have NSC decertificated from any portions of its certificated service area included within the territory requested by Wax-Mid.
 16. Counsel for Wax-Mid also stated on the record his agreement with the imposition of the two conditions recommended by staff witness Bokhoff to be satisfied prior to the granting of an actual certificate of convenience and necessity to Wax-Mid, namely that Wax-Mid submit evidence that it has obtained approval of its proposed tariff and a construction approval letter from the Texas Department of Health.
 17. Wax-Mid's requested service area is the Diamond J Ranch, which consists of approximately 1,700 acres. Development of this area will occur in increments of 80 acres per year, spread over 10 to 20 years. Residential service could be required as early as mid-summer 1986.
 18. Black Land Properties will develop the Diamond J Ranch as a planned residential development.
 19. The proposed development needs to have a large water source available that could be upgraded as necessary to meet the developer's needs. If Wax-Mid's CON application is denied, development plans would be halted for the present time.

20. To accommodate the ultimate levels of occupancy, Wax-Mid proposes two separate wells, each having a capacity of 500 gallons per minute, with adjacent storage and pumping facilities. Initially, only one well would be drilled. Underground water mains would be constructed as required. The second well would be drilled and connected to the distribution system when required by the level of development.
21. The water supply would be obtained by drilling a deep well in the Trinity Sand Aquifer. Well No. 1 would be approximately 2750 feet deep to penetrate the aquifer. Well No. 2 would be longer since it will be situated on higher ground, but its penetration into the aquifer will be similar to that of Well No. 1.
22. It is anticipated that the water to be obtained from these wells will be suitable for domestic consumption with only limited treatment.
23. Prior to distribution, the water will be cooled, the hydrogen sulfide will be removed, and it will be chlorinated for disinfection purposes.
24. The water from Well No. 1 will be stored in a 100,000-gallon steel ground storage tank. It will then be withdrawn as needed and pumped into a 5,000-gallon steel pressure tank prior to entering the distribution lines.
25. Pumps, electrical controls, disinfection facilities, and miscellaneous other equipment will be housed in a concrete masonry building. The well and storage site will be fenced.
26. When Well No. 2 is constructed, an elevated water storage will be installed for use in providing domestic water service and fire protection.
27. The water distribution lines will be sized to allow for future growth and extensions to various parts of the development. The main trunk feeder lines will be 8-inch PVC pipe with branch lines to development areas of 6-inch

- PVC pipe. The minimum size main will be 4-inch PVC pipe to allow for fire hydrant attachment.
28. The water system will comply with rules and regulations and minimum design criteria of the Texas Department of Health.
 29. Black Land intends to eventually install some type of sewer system in the Diamond J Property.
 30. Wax-Mid has selected Mr. Arthur Black to be the operator of its water system. Mr. Black has a Class A water license and a Class B sewage license. He has 25 years experience in the water service area.
 31. It is uncontroverted that Wax-Mid is capable of constructing and operating a water utility in its requested service area that will meet state standards.
 32. WSC's opposition to Wax-Mid's application was predicated on WSC's belief that it is certificated to serve the entire area requested by Wax-Mid.
 33. WSC does not have any facilities in the requested area shown on Wax-Mid Exhibit No. 6 and is not providing any service to that area.
 34. WSC does not presently have the capacity to serve even 160 houses in the first 80-acre increment to be developed in Wax-Mid's requested area.
 35. WSC has a certificated facility that runs north from U.S. 287 along the County Road on the western boundary of Wax-Mid's requested area. The certificate map for WSC shows the facility to be on the west side of the road. If the location of this facility as shown is correct, the overlap of Wax-Mid's requested service area with WSC's certificate would be very small. If the facility is in actuality located on the east side of the road, the overlap would be approximately 200 feet by 2,500 feet.
 36. Due to the small area of potential overlap, major facilities will not be duplicated.

37. It is necessary for the service, accommodation, convenience or safety of the public to grant Wax-Mid a certificate of convenience and necessity to the geographic area contained within the dotted and dashed line on the map prepared by Shiva-Hattery Engineers, entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Wax-Mid witness Kammerer admitted as Wax-Mid Exhibit No. 2, because there is presently no existing service in this requested area.
38. Since there is presently no existing service in the requested area, this non-existing service is inadequate to meet the needs of Black Land's proposed development.
39. Since counsel for Wax-Mid agreed that the certificate should be conditional upon Wax-Mid obtaining approval of its proposed tariff and a construction approval letter from the Texas Department of Health, the Texas Water Commission should issue an Order preliminary to the issuance of certificate of convenience and necessity, pursuant to PURA Section 57 and Section 13.249 of the Texas Water Code, as amended, declaring that the certificate of convenience and necessity will be awarded after Wax-Mid has presented satisfactory evidence showing that the two conditions have been met.
40. Certificate of Convenience and Necessity No. 10050 issued to Sardis-Lone Elm Water Supply Corporation by final Order entered in Docket No. 22 on December 6, 1977 is a facilities certificate rather than an area certificate. WSC was granted a certificate to its facilities and a 400-foot-wide corridor surrounding its distribution lines.
41. Since the area requested by Wax-Mid is presently uncertificated and unserved, it is probable that service will be improved by the granting of the requested certificate, which will enable Wax-Mid to begin constructing a system

to provide service to the planned Black Land's development.

42. Since service is presently unavailable in the requested area, it is not necessary to evaluate whether the granting of this OCN will lower the cost to consumers in this area.
43. No evidence was presented relating to the factors of community values, recreational and park areas, historical aesthetic values, or environmental integrity.

CONCLUSIONS OF LAW

1. The Public Utility Commission had jurisdiction over the matters considered herein pursuant to PURA Sections 50, 52, and 54, Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1986).
2. The Texas Water Commission assumed jurisdiction over the matters considered herein on March 1, 1986, pursuant to Sections 13.242, 13.244, and 13.246, Texas Water Code, as amended.
3. Sardis-Lone Elm Water Supply Corporation is an Article 1434a water supply corporation as defined by PURA Section 3(u) and Section 13.002(18) of the Texas Water Code, as amended. WSC is a retail public utility as defined by PURA Section 49(a) and Section 13.241(1) of the Texas Water Code, as amended, that provides water service to the public.
4. The newspaper notice published by Wax-Mid on October 17 and 24, 1984, complies with the requirements of P.U.C. PROC. R. 21.24(c)(1).
5. Notice mailed to all cities and neighboring utilities providing the same utility service within five miles of the requested service area complies with the requirement of Item No. 6 of the water certificate of convenience and necessity application and with P.U.C. PROC. R. 21.24(c)(2).

6. WSC was granted intervenor status pursuant to P.U.C. PROC. R. 21.24.
7. It is necessary for the service, accommodation, convenience, or safety of the public to grant Wax-Mid a certificate of convenience and necessity to those portions of the Diamond J Ranch encompassed by the dotted and dashed line on the Shive-Hattery Engineers map entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and attached to the testimony of Michael L. Kammerer admitted into evidence as Wax-Mid Exhibit No. 2, so that the development planned by the Black Land Corporation can proceed and water service will be available to persons who will reside in that area as it becomes developed. Thus the requirements of PURA Section 54(b) and of Section 13.246(b) of the Texas Water Code, as amended, have been met.
8. Because counsel for Wax-Mid agreed with the Commission staff's recommendation that the certificate of convenience and necessity granted to Wax-Mid be conditioned upon Wax-Mid obtaining approval of its proposed tariff from the Texas Water Commission and a construction approval letter for the Texas Department of Health, it is appropriate to issue an Order preliminary to the issuance of a certificate of convenience and necessity pursuant to PURA Section 57 and Section 13.249 of the Texas Water Code, as amended. Upon the presentation to the Texas Water Commission of evidence that Wax-Mid has obtained the two required items, a certificate of convenience and necessity should be issued.
9. Certificate of Convenience and Necessity No. 10050 issued to WSC in Docket No. 22 is a PURA Section 53 "grandfather" certificate that grants to WSC the right to provide service to a corridor within two hundred feet (200) of any point along its distribution lines.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS WATER COMMISSION THAT:

1. Wax-Mid, Inc. is ISSUED an Order preliminary to the issuance of a certificate of convenience and necessity for that portion of the Diamond J Ranch contained within the dotted and dashed lines on the Shive-Battery Engineers map entitled "Proposed Water Distribution System for Wax-Mid Inc.", dated 11-13-85, and admitted into evidence as part of Wax-Mid Exhibit No. 2. Wax-Mid will be granted a certificate of convenience and necessity upon presentation to the Texas Water Commission of satisfactory evidence showing that Wax-Mid's proposed tariff has been approved and that it has obtained a construction approval letter from the Texas Department of Health. This presentation shall be made by filing the required documents with the Texas Water Commission, to be docketed and reviewed by that Commission's staff.
2. The Chief Clerk of the Texas Water Commission shall forward a certified copy of this Order to all parties.
3. If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Signed this 1st day of July, 1986.

TEXAS WATER COMMISSION

Paul Hopkins
Paul Hopkins, Chairman

Ralph Downing
Ralph Downing, Commissioner

John O. Houchins
John O. Houchins, Commissioner

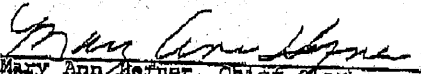
ATTEST:

Mary Ann Rehn
Mary Ann Rehn, Chief Clerk

STATE OF TEXAS
COUNTY OF TRAVIS

I, Mary Ann Rehner, Chief Clerk of the Texas Water Commission, do hereby certify that the attached and foregoing is a true and correct copy of an Order of the Commission dated July 1, 1986, on an application of WAX-MID, Inc., for a Certificate of Convenience and Necessity (Docket No. 5951), the original of which is on file in the office of the Commission.

Given under my hand and the seal of the Texas Water Commission, this the 3rd day of July, 1986.


Mary Ann Rehner, Chief Clerk
Texas Water Commission